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569-954—75——1

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-714

DAVID T. DELLINGER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–30a) is reported at 502 F. 2d 813. Opinions of the district court are reported at 370 F. Supp. 1304 and 357 F. Supp. 949.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1974. The court denied a petition for rehearing and suggestion for rehearing *en banc* on October 16, 1974. On November 4, 1974, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including

December 9, 1974, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether *Alderman* v. *United States*, 394 U.S. 165, requires the government to make available to defendants in a contempt proceeding all logs of electronic surveillance, even though the government's case is composed solely of the transcripts of the trial at which the contempt occurred.

2. Whether the conduct of petitioner Kunstler was sufficiently obstructive and sufficiently intentional to support a conviction for contempt.

3. Whether prosecution of petitioners for contempt was unjust because acts of misconduct by the prosecutor were not punished by contempt, and because an unjudicial atmosphere was created in part by the trial judge and prosecutors.

STATEMENT

Petitioners were cited for contempt during the "Chicago Seven" trial, involving alleged violations of the Anti-Riot Act of 1968 during the August 1968 National Convention of the Democratic Party in Chicago, Illinois. The substantive convictions in that case were reversed on appeal (*United States* v. *Dellinger*, 472 F. 2d 340 (C.A. 7)), and the government elected not to retry the defendants. Petitioners Dellinger, Hoffman and Rubin were among the defendants in that case, and petitioner Kunstler was one of two counsel for the defendants.

After the Anti-Riot Act case had been submitted to the jury, United States District Judge Julius Hoffman summarily held all seven defendants and both attorneys in contempt of court. Thirty-two specifications were listed against Dellinger, 23 against Hoffman, 15 against Rubin and 24 against Kunstler. The consecutive sentences imposed aggregated eight months' imprisonment for Hoffman, and other sentences were longer. The longest was a term of four years' and 13 days' imprisonment for Kunstler. The contempt convictions also were reversed on appeal and the case was remanded for retrial before another judge. *In re Dellinger*, 461 F. 2d 389 (C.A. 7).

Prior to the second trial the Chief Justice, pursuant to 28 U.S.C. 292(d), designated United States District Judge Edward T. Gignoux to hear the case. Without objection, Judge Gignoux granted the government's motion to limit the maximum sentence against any defendant to 177 days.[1]

The district court also denied defense motions to dismiss the charges, for a jury trial, for discovery of exculpatory material, and for disclosure of electronic or other surveillance. *In re Dellinger*, 357 F. Supp. 949 (N.D. Ill.). On the government's motion, the court dismissed 89 of the 141 specifications of contempt with which petitioners and their two co-defendants had been charged (Pet. App. 28a).

The remaining 52 specifications were tried before

[1] In reversing the original contempt convictions, the court of appeals had suggested that, if the district court elected so to limit the maximum sentence prior to the second trial, the need for a jury trial would be eliminated. 461 F. 2d at 397.

Judge Gignoux, sitting without a jury. The government's case in chief consisted solely of the official transcript of the Anti-Riot Act trial. At its conclusion, the court dismissed two specifications of contempt and rendered judgments of acquittal on 24 others. This disposed of all charges against two of petitioners' codefendants (*In re Dellinger,* 370 F. Supp. 1304, 1307 (N.D. Ill.)) At the end of the trial Judge Gignoux acquitted non-lawyer defendants Rennard Davis and Thomas Hayden and lawyer-defendant Leonard Weinglass on all charges, and petitioners on some of the charges against them. Petitioners Hoffman, Rubin and Kunstler each were convicted on two specifications and Dellinger on seven specifications of contempt. The court imposed no sentences and discharged petitioners. *Id.* at 1323–1324. The court of appeals affirmed (502 F. 2d 813; Pet. App. 1a–30a).

ARGUMENT

1. Petitioners contend (Pet. 53–58) that under *Alderman* v. *United States,* 394 U.S. 165, they were entitled to complete records of electronic surveillance, including alleged overhearings of conversations of petitioners and their co-defendants, counsel and legal staff, before they could be tried for contempt of court. We submit that *Alderman* is inapposite. *Alderman* was based upon the Fourth Amendment exclusionary rule and entitles defendants to discovery of logs and tapes so that they may ascertain, in an unfettered fashion, whether evidence or derivative evidence was obtained through unlawful surveillance. It does not grant "unlimited license to rummage in the files of

the Department of Justice." *Id.* at 185. The defendant's right of access is limited to material that could have produced evidence used at trial, and that could, therefore, be the subject of a motion to suppress. *Id.* at 201 (Fortas, J., concurring in part and dissenting in part); *United States* v. *Lemonakis*, 485 F. 2d 941 (C.A.D.C.) (*en banc*), certiorari denied, 415 U.S. 989.

In the instant case, the government's case in chief was comprised solely of the transcript of the Anti-Riot Act trial. Because this evidence could not have been derived from or tainted by unlawful electronic surveillance, *Alderman* does not require its production.[2]

Petitioners' claim is more in the nature of an asserted right of access under *Brady* v. *Maryland*, 373 U.S. 83, to material that might be exculpatory or favorable to their defense, even though no evidence from the overhearings has been used by the government. Petitioners contend that overhearing of persons on the defense staff could have resulted in government prov-

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[2] Judge Gignoux stated (*In re Dellinger*, *supra*, 357 F. Supp. at 959):

"Defendants are quite correct that *Alderman* requires disclosure to the defendants of unlawful surveillance records which might conceivably be the source of the government's evidence in the usual federal criminal case. But this Court simply cannot understand *Alderman* to have mandated disclosure of surveillance records in a direct contempt proceeding such as the present one, in which the government's evidence will concern only the courtroom behavior of the defendants and in which it is demonstratively impossible that electronic surveillance could taint the limited evidence upon which the government will rely. This case presents no question of taint and thus does not involve a 'complex' exercise of judgment of the kind described by the Supreme Court in *Alderman*."

ocation of contumacious conduct by defendants and their counsel (Pet. 54–56). However, the government followed a procedure permissible under *Brady* and its progeny by undertaking prior to trial to disclose to defendants any material covered by the *Brady* doctrine (Pet. App. 16a), and to make overhearings available to the court *in camera* to allow it to verify the government's representation that it possessed no exculpatory material. The district court and the court of appeals reviewed these submissions and concluded that they contained no exculpatory material (*In re Dellinger, supra,* 357 F. Supp. at 960, n. 14; Pet. App. 17a). Petitioners' claim, therefore, does not merit further review.

2. Petitioner Kunstler contends that the conduct resulting in his conviction on two specifications of contempt (VI and VII) consisted of vigorous representation of his clients without contumacious intent, and that his actions did not actually tend to obstruct the trial proceedings. He also contends, with respect to one of his convictions, that he was found guilty without proper notice of the charges. We believe that the lower courts accurately applied settled principles to the novel facts of this case, and that there is no need for further review by this Court.

a. The two specifications of contempt are set forth in the petition (Pet. App. 69a–88a). The background events and content of specification VI were summarized by Judge Gignoux as follows (370 F. Supp. at 1319):

> On Friday, January 30, Mr. Kunstler represented to the court that the defendants had

completed the presentation of their "live" witnesses. He requested and obtained a weekend recess so that the defense might locate a cameraman necessary to authenticate a film, the admission of which, together with certain documents, would conclude the defense case. On Monday morning, February 2, Mr. Kunstler informed the judge that over the weekend the defendants had learned that the Reverend Ralph Abernathy had returned to the United States from Europe and would be available to testify later that morning. Mr. Kunstler asked to be relieved of his prior commitment in view of this unforeseen development. The government objected, and the judge denied Mr. Kunstler's motion. At this point, Mr. Kunstler made the extended remarks set forth in Kunstler VI. In the course of these comments, he termed the judge's ruling "about the most outrageous statement I have ever heard from a bench," violating "every principle of fair play;" stated that he felt "disgraced to be here" and that the judge could hold him in contempt if he wished to do so; accused the judge of extreme bias; documented his accusations with a quotation from *The New York Times* which had characterized a prior ruling of the judge as "the ultimate outrage in American justice"; called the trial "a legal lynching"; and concluded with the following observation: "and that, your Honor, is wholly responsible for that, and if this is what your career is going to end on, if this is what your pride is going to be built on, I can only say to your Honor, 'Good luck to you'." Shouts of "Right on" and applause followed.

Petitioner Kunstler's claim that this did not consti-

tute "actual obstruction of justice" (*In re McConnell*, 370 U.S. 230, 236) was properly rejected by the court of appeals, on whose opinion we rely (Pet. App. 4a–5a):

> [T]he extent and violence of Kunstler's diatribe and the bitterness and anger displayed "constituted a vicious personal attack on the judge which could only have served to vent his spleen." 370 F. Supp. at 1319. In no way can Kunstler's remarks be considered as merely heated legal argument and therefore non-contemptuous. Because of the extreme nature of the attack on the trial judge, the remarks of counsel created an imminent prejudice to a fair and dispassionate proceeding, thus constituting an actual and material obstruction of the judicial process. See [*In re Dellinger,*] 461 F. 2d at 400.[3] Moreover, as the trial judge found, Kunstler's conduct "resulted in an entirely un-

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[3] In *In re Dellinger*, *supra*, 461 F. 2d at 396, Kunstler's remarks constituting specification VI were a principal basis of the court of appeals' holding that the contempt convictions of all the defendants had to be reversed and the case retried before another judge. The court stated with respect to the remarks: "no judge could remain impartial toward Mr. Kunstler after the judge's honestly and integrity were [thus] assailed * * *."

Kunstler's contention that mere "insults" to the trial judge are not sufficient to constitute actual obstruction, although correct (*Holt* v. *Virginia*, 381 U.S. 131, 137), does not aid him. As a noted commentary on the law of contempt states:

"At some point there is more involved than insult; there is a demeanor that converts serious search for truth and justice into a rally run on rhetoric. And it is this, not insult, that justifies the contempt sentence in such cases" (Dobbs, *Contempt of Court: A Survey*, 56 Cornell L. Rev. 183, 206 (1971)).

necessary and not insignificant delay and disruption of the proceedings" (370 F. Supp. at 1320), reinforcing his holding that there was an actual and material obstruction of the administration of justice.

Petitioner Kunstler contends, however (Pet. 40–44), that both courts below erred in judging his vigorous defense of his client by whether a "reasonable lawyer" would have known that Kunstler's conduct was impermissible. This contention is without substance. Judge Gignoux's finding (370 F. Supp. at 1320) that Kunstler himself knew that his conduct was wrongful is fully supported by the transcript (Pet. App. 69a–72a), and the "reasonable lawyer" standard therefore does not affect the outcome of this case. In any event, the standard of contumacious intent formulated by the court of appeals in *In re Dellinger, supra,* 461 F. 2d at 400, and applied by Judge Gignoux, gave full recognition to Kunstler's arguments regarding "the peculiarly individualistic aspects of advocacy" (Pet. 42–43).[4] Nor, contrary to Kunstler's suggestion, is

[4] The court stated:

"Attorneys have a right to be persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting in their client's behalf. An attorney may with impunity take full advantage of the range of conduct that our adversary system allows. Given this extreme liberality necessary to a vital bar and thus the effective discovery of truth through the adversary process, an attorney possesses the requisite intent only *if he knows or reasonably should be aware in view of all the circumstances*, especially the heat of controversy, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth" (emphasis added).

there any conflict between the circuits on the correct standard of intent.[5]

b. Specification VII (Pet. App. 73a–88a) was summarized by Judge Gignoux as follows (370 F. Supp. at 1320):

> On the morning of February 2, following the judge's denial of Mr. Kunstler's motion for leave to present the Reverend Ralph Abernathy as a defense witness (see Kunstler VI), the judge called on the defendants either to present further evidence or to rest. Mr. Kunstler stated that the defendants were not going to rest, as Dr. Abernathy was on his way from the airport and prepared to testify. Over Mr. Kunstler's

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[5] In *Caldwell* v. *United States*, 28 F. 2d 684 (C.A. 9), cited by Kunstler as in conflict with the Seventh Circuit's standard, the issue was whether a question by defense counsel was a "willful" attempt to evade a ruling by the trial court sustaining objection to his previous question. In reversing counsel's contempt conviction, the court of appeals said:

"If counsel here *reasonably believed* the subject material, it was his right, if not his duty, to disclose specifically what he expected to show, either by an offer of proof or by a question substantially in the form of that asked * * *" (emphasis added).

The other cases cited by petitioner (Pet. 41, nn. 29, 30) likewise present no conflict, as the Seventh Circuit recognized in *United States* v. *Seale*, 461 F. 2d 345, 367–369. *Offutt* v. *United States*, 232 F. 2d 69 (C.A.D.C.), certiorari denied, 351 U.S. 988, for example, held that where "clearly blameworthy" conduct is present, a finding of contumacious intent may be dispensed with altogether, but where such conduct is absent, "some sort of wrongful intent" must be shown. 232 F. 2d at 72. Whatever the merits of this distinction, wrongful intent was found in the instant case, and petitioner Kunstler's conduct was therefore contumacious under even the most rigorous standard. See, also, Specification VII: petitioner Kunstler expressly announced (Pet. App. 74a) that he would intentionally disobey a court order.

objection, the judge rested for the defendants. At the request of government counsel, the judge ordered the defendants and their counsel to make no reference before the jury to the fact that they wanted Dr. Abernathy to testify. There ensued the colloquy set forth in Part I of Kunstler VII, in which Mr. Kunstler stated that he was not going to abide by the court's order; that he was going to repeat his motion before the jury; and that the judge would have to send him to jail. The jury then returned to the courtroom, and the judge informed the jury that since the defendants were not ready to proceed, he had rested for them. Mr. Kunstler objected and informed the jury that the defendants were prepared to go ahead with Dr. Abernathy. Shortly thereafter, Mr. Kunstler interrupted the examination of the government's first rebuttal witness to inform the court that Dr. Abernathy had just arrived. There then ensued, in the presence of the jury, the colloquy set forth in Part II of Kunstler VII, during which Mr. Kunstler renewed his motion to call Dr. Abernathy as a defense witness and persisted in arguing the motion after it had been denied by the judge and after the judge had repeatedly ordered him to sit down.

The court of appeals affirmed Judge Gignoux's finding of contempt, stating (Pet. App. 7a):

> The facts under this specification are clearly contempt because Kunstler violated a court order [*In re McConnell*, 370 U.S. 230]. Further, he obstructed justice by putting before the jury information that had been ruled inadmissible, making it more difficult for the jurors to decide the case according to the law

> as interpreted by the district judge. As we previously held, lawyers are required to obey even incorrect orders; the remedy is on appeal. [*In re Dellinger,*] 461 F. 2d at 398.

See also *Maness* v. *Meyers,* No. 73–689, decided January 15, 1975, slip op. 9–10.

Petitioner Kunstler's contention that he did "no more than take account of the intervening facts" (Pet. 39) when he informed the jury that the defendants were prepared to go ahead with Dr. Abernathy is without substance. There was no "intervening fact" other than the trial judge's notification to the jury that he had rested for the defendants because they had refused to,[6] and petitioner Kunstler's own response (Pet. App. 76a), revealing in the presence of the jury the very information he had been forbidden to reveal. Even assuming, however, that petitioner was entitled to mention Dr. Abernathy in response to the judge's statement, there was no justification for his persistence in arguing the motion over the judge's repeated orders to stop (Pet. App. 85a–88a).

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[6] It was, of course, incumbent upon the trial judge to inform the jury that it was again the government's turn to present witnesses. Had he stated merely that "the defense has rested," petitioner surely would have objected to this as a "misstatement" (Pet. 18–19) and asserted his right to correct it. Yet petitioner contends that by apprising the jury that he had rested for the defendants, and explaining why, the judge dissolved *sub silentio* his order forbidding reference to Dr. Abernathy's testimony. The result of this reasoning would be to strip the trial court of the authority to enter such an order. However mistaken the order may have been, as the court of appeals observed, the forum for review of the court's order was on appeal.

c. There is no merit to petitioner Kunstler's claim (with respect to specification VII) that he was convicted upon a charge not made (Pet. 45–49). The specification stated (Pet. App. 73a) that Kunstler was ordered "not [to] mention the name of the Reverend Abernathy in front of the jury"; in fact the court's order had been that he make no statement to the effect that the defense wanted Dr. Abernathy to testify. The difference is one of semantics only, for both statements forbid the same conduct. Moreover, petitioner clearly understood the order at the time; he did not ask for clarification but instead declared his intent to violate it (Pet. App. 73a–74a). Finally, as the court of appeals pointed out, because "the specification quotes Judge Hoffman's orders verbatim, there could be no doubt what Kunstler was charged with violating" (Pet. App. 8a).

3. All petitioners contend that their convictions were unconstitutionally discriminatory because the government, in prosecuting them for contempt, "proceed[ed] in the theory that the contempt process is to be employed only against defense counsel and not against prosecutors guilty of the same acts" (Pet. 50). This contention is inaccurate. The contempt charges were initiated not by the government but by the trial judge in whose court the contempt occurred. Although the court of appeals, in reversing the defendants' convictions for violation of the Anti-Riot Act, concluded that "the demeanor of the judge and prosecutors would require reversal if other errors did not" (*United States* v. *Dellinger, supra,* 472 F. 2d at 391), the same court in *In re Dellinger, supra,*

461 F. 2d at 401, expressly declined to dismiss the contempt charges against petitioners (except as to those legally insufficient) because of judicial and prosecutorial misconduct. The government clearly was justified by this judicial decision—irrespective of any belief on its part that contempt is a remedy more necessary against defense misconduct than against prosecutorial misconduct—in reprosecuting petitioners.[7] The government's testimony in the district court satisfied both courts below that its purpose in going forward with the prosecution was not discriminatory against defense counsel as a class and had a rationa. basis (Pet. App. 14a, 36a–37a). Accordingly, petitioners' claim merits no further review here.

Nor, finally, is there merit to petitioners' contention that the Anti-Riot Act trial "was so infected by prosecutorial and judicial misconduct that there was no judicial proceeding upon which a conviction for contempt could be sustained" (Pet. 62). The court of appeals rejected this contention on three separate occasions. Petitioners made a massive contribution to the breakdown of the judicial process. Although petitioners were not the only individuals responsible for this breakdown, they are not immune from responsibility for consequences occasioned in large measure by their conduct. Based upon Judge Gignoux's observation (370 F. Supp. at 1321)

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[7] As the United States Attorney testified in the district court, it was the government's belief that if it abandoned the prosecution it would break faith with every district judge in the nation (Tr. 2502). Although this may be an overstatement, it discloses a legitimate basis for the prosecution.

> that the contumacious conduct of the defendants and their lawyers cannot be considered apart from the conduct of the trial judge and prosecutors. Each reacted to provocation by the other, and the tensions generated during four and a half months of so acrimonious a trial cannot be ignored[.]

Judge Gignoux concluded that "the affirmation of the integrity of trial proceedings and the goal of deterrence have both been achieved by the findings of guilt," and that no sentences or fines should be imposed upon the defendants (*id.* at 1321–1322). Without agreeing or disagreeing with the wisdom of this course, the court of appeals concluded (Pet. App. 29a):

> To insure continuing respect for the judicial system, it was necessary to try the defendants for the overwhelming misconduct they demonstrated at the conspiracy trial.

We rely upon that conclusion.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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